

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

People of the State of Michigan,
Plaintiff

v

Damaceno R. Abrego,
Defendant

LC No. 13H15796FH

COA No. 320973

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DEFENDANT-APPELLEE'S REPLY BRIEF IN OPPOSITION
TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Date: 10-9-15



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COUNTER-STATEMENT OF FACTS

The Defendant pled guilty to OWI 2nd with occupant under 16. On the date of the incident, the Defendant was pulled over while driving home from a video store with his children¹. At Sentencing, the Defendant made various objections to the scoring of the sentencing guidelines, including OV 8, among others². The Defendant submitted an application for leave to appeal with the Michigan Court of Appeals. The Court of Appeals issued an opinion on 6/11/15, vacating the Defendant's sentence and remanding the case back to the Trial Court for resentencing, after finding that the Trial Court erred in scoring the Defendant with fifteen points under OV 8³. A dissenting opinion by the minority was also issued, finding no error by the Trial Court. The instant action followed, with the Plaintiff filing application for leave to appeal with the Michigan Supreme Court.

¹ PSIR pp 2, 4.

² Sentencing Transcript, pp 7-9.

³ *People v Abrego*, #3209973 Unpublished (COA 6/11/15)

STATEMENT OF QUESTIONS PRESENTED

- I. Pursuant to MCL 777.38, a Defendant shall receive 15 points on this offense variable if a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. In the present case, the Trial Court assessed 15 points to the Defendant for OV 8. The Defendant appealed this decision and the Michigan Court of Appeals ruled that the Trial Court improperly scored OV 8, citing *People v Spanke*, finding that movement occurring in the instant case was incidental to commitment of the underlying offense. The Plaintiff now appeals the decision applying for leave to appeal with the Michigan Supreme Court. Did the Court of Appeals error in reversing the Trial Court's ruling that asportation was applicable under OV 8 and MCL 777.38?

PLAINTIFF-APPELLANT STATES: YES

DEFENDANT-APPELLEE STATES: NO

COURT OF APPEALS STATES: NO

TRIAL COURT STATES: YES

REBUTTAL ARGUMENTS

STANDARD OF REVIEW: Defendant must raise objections to scoring guidelines and offense variables at sentencing in order to preserve such claims for appeal. MCR 6.429(C). Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*. *People v Hardy*, 484 Mich 430, 438; 855 NW2d 340 (2013). The Trial Court's factual determinations are reviewed for clear error and scoring of sentencing guidelines must be supported by a preponderance of the evidence. *id.*

IA. The Michigan Court of Appeals did not error in vacating the sentence and remanding for sentencing.

The Court of Appeals properly evaluated the Trial Court's actions assessing OV 8 and found error. The standard of review cited above provides precedent for the correct procedures to be taken, which the Court of appeals correctly performed. The Court of appeals found that the Defendant had made proper objections to OV 8 at the Trial Court, and thus preserved it for appeal⁴. The Court of Appeals was required to review the Trial Court's factual determinations for clear error and the Trial Court's application of facts to law *de novo*. The Court of Appeals correctly evaluated the record, finding that the Trial Court incorrectly found asportation of the victims, citing *People v Spanke* to correctly interpret the meaning of the statute⁵. *Spanke* is a published opinion and remains existing law and has been previously cited to interpret the statutory interpretation of the language of OV 8⁶.

The Court of Appeals, in determining error, is not confined merely to agreeing or disagreeing with the parties' arguments; rather the Court of Appeals was required to review the relevant issues *de novo*. The Court of Appeals, in analyzing the record and arguments, found that both parties and the Trial Court "failed to acknowledge that any movement of the children

⁴ *People v Abrego* slip op pg. 2

⁵ *People v Spanke*, 254 Mich App 642; 658NW2d 504 (2003).

⁶ See *People v Bowman*, #317535 Unpublished, (COA January 22, 2015), *People v Dillard*, 303 Mich App 372 (2013); *People v Thompson*, 488 Mich 888 (2010).

was incidental to the underlying offense and that incidental asportation cannot be scored under OV 8.” Thus the Court of Appeals did not error and this Court should affirm their decision.

IB. A plain reading of the statute with application of the facts of this case does not support the scoring of OV 8.

MCL 777.38 contains the provisions for OV 8, which concerns victim asportation or captivity. 15 points are to be assessed where: [1] “a victim was asported to another place of greater danger or [2] to a situation of greater danger or [3] was held captive beyond the time necessary to commit the offense.”⁸

The victim was not asported to another place of greater danger.

In analyzing this first provision, the facts in this case are that the Defendant drove his daughter to the video store⁹. He then left with the intent to return home. However, the Defendant was instead pulled over by police¹⁰. Neither the Defendant’s home, parking lot, nor any place in between can be considered a “place of greater danger” as required by OV 8. Thus, this element of asportation cannot be established.

The Victim was not asported to a situation of greater danger.

In analyzing this second provision, The Defendant was charged with OWI with an occupant under age 16. He was convicted of that offense. However, nothing about the charge itself or the facts of this case create another or additional situation of “greater danger”. Nothing in the record supports that, subsequent to the Defendant actually deciding to drive intoxicated, he put his child in a situation of greater danger. In fact, driving while intoxicated is incidental to the offense. It is the actual offense. Thus this element of asportation cannot be established.

The victim was not held captive beyond the time necessary to commit the offense.

⁷ *Abrego*, p. 3, Footnote 2.

⁸ MCL 777.38(1)(a).

⁹ Plea Transcript p. 9

¹⁰ Sentencing Transcript pp. 9-10.

In analyzing the third provision, there is no evidence on the record that the victim, the Defendant's child, was ever held captive. Moreover, since at sentencing the Trial Court did not discuss captivity in regards to the scoring OV 8, so this provision is inapplicable¹¹.

IC. The controlling legal provisions from *Spanke* are not Dicta and provide the proper interpretations of the law.

The Appellant relies on the Dissenting opinion in the present case. Specifically, the dissenting opinion states "The portion of *Spanke* the majority relies on is dicta, and even if it was not, it is simply incorrect."¹² However this argument fails to persuade on both accounts.

Dictum can be defined as:

an observation or remark ... concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion¹³.

The precise issue in the present case is the application of 15 points to OV 8. The Court of Appeals in *Spanke* was also considering this exact same issue. The Court in *Spanke* cites *People v Green* to support its reasoning:

To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime (unless the underlying crime involves murder, extortion, or taking a hostage)¹⁴.

The *Spanke* Court makes two conclusions in interpreting the language of OV 8: 1) that asportation can be accomplished without using force against the victim, and 2) that to establish asportation, the movement of the victim must not be incidental to committing the underlying offense. These criteria are not mutually exclusive, but are both to be considered with regard to the element of asportation.

¹¹ Sentencing Transcript pp 7-9.

¹² *Abrego*, Dissenting Opinion, slip op pg.1

¹³ Black's Law Dictionary (6th ed), p 454.

¹⁴ *People v Green*, 228 Mich 684; 580 NW2d 444, 451 (1998).

It is well settled that using or not using force is not a factor under OV 8. Only movement is relevant¹⁵. Moreover, the Court of Appeals applied the “incidental movement” test from *Spanke*, and found that the actual movement was merely incidental to the commission of the Defendant’s offense, that being OWI 2nd involving an occupant under 16¹⁶. As such, the Court of Appeals did not error and this Court should affirm their decision.

ID. The Michigan Court of Appeals did not raise the issue of OV 8 Sua Sponte

The Appellant’s argument that this issue was raised *Sua Sponte* and that it was not raised in the Circuit Court is without merit. The Court of Appeals correctly noted that the Defendant raised objections to OV 8 at Sentencing, and thus preserved the claim for appeal. Such issues on appeal, pursuant to the proper standard of review, are done so *de novo*¹⁷.

MCL 777.38 does not define asportation, thus requiring the Court of appeals to carefully interpret the statute from controlling precedent. Additionally, the Court of Appeals must fully analyze the trial courts factual determinations and statutory interpretation, so it must necessarily consider, regardless of the Defendant’s arguments, whether the Trial Court properly assessed fifteen points under OV 8. The Michigan Court of Appeals did so and this Court should affirm their decision.

IE. The Court of Appeals is allowed to raise issues Sua Sponte.

Even if the issue raised by the Court of Appeals was done so *sua sponte*, there is still no error. The Court of Appeals may "enter any judgment or order or [to] grant further or different relief as the case may require[.]"¹⁸ The decision and order entered by the Court of Appeals was within their discretion, consistent with legal precedent, and it must be affirmed.

¹⁵ *Spanke, Bowman, Dillard Supra*. Regarding use of force see also: *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

¹⁶ *Abrego*, p. 3 ¶1.

¹⁷ *Abrego*, pg. 2.

¹⁸ MCR 7.216(A)(7). See also *People v McDade*, 301 Mich App 343, 359; 836 NW2d 266 (2013).

SUMMARY AND RELIEF

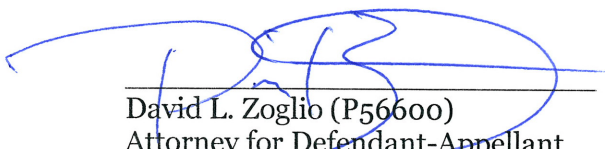
The Defendant-Appellee believes that he was incorrectly sentenced, and the proper arguments and issues were preserved and properly argued upon Appeal. The Michigan Court of Appeals correctly found an error by the Trial Court and ordered the necessary relief, to vacate the sentence and remand for resentencing. The Michigan Supreme Court should affirm the Decision of the Michigan Court of Appeals.

ORAL ARGUMENT REQUESTED

The Defendant-Appellant would respectfully request oral argument pursuant to all applicable statutes and court rules.

Submitted By:

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